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No. 06-866

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In The

Supreme Court of the United States

SHERRI YAX, ET AL.,

Petitioners,

v.

UPS AND LIBERTY MUTUAL INSURANCE CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

Whether petitioners' civil RICO case alleging mail fraud based on the filing of notices of dispute with the state worker's compensation bureau was properly dismissed because petitioners failed to adequately plead fraud or that anyone relied upon any alleged fraud to their detriment, as required to support a claim under 18 U.S.C. § 1964(c) that they were entitled to treble damages for injury purportedly suffered "by reason of" the alleged mail fraud.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent UPS (also identified below as United Parcel Service, Inc.), an Ohio corporation, is a wholly-owned indirect subsidiary of United Parcel Service, Inc., a publicly-traded Delaware corporation. No publicly held company owns 10% or more of United Parcel Service, Inc., a publicly-traded Delaware corporation's stock.

Liberty Mutual Group owns 100% of the stock of respondent Liberty Mutual Insurance Company, which is a Massachusetts Stock Insurance Company. LMHC Massachusetts Holdings Inc. owns 100% of the stock of Liberty Mutual Group Inc. Liberty Mutual Holding Company Inc. owns 100% of the stock of LMHC Massachusetts Holdings Inc. No publicly traded entity owns any stock of any of the above-named entities.

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INTRODUCTION

This case arises out of claims by petitioners for worker's compensation benefits that they attempted to transform into a civil RICO suit for treble damages after notices of dispute were filed that questioned the continuing nature of petitioners' work-related injuries and entitlement to benefits. Petitioners asserted that they suffered RICO injury based on the suspension of their benefits purportedly caused by alleged fraudulent statements in the notices of dispute.

Petitioners cannot meet the proximate cause requirement to maintain a civil RICO action under 18 U.S.C. § 1964(c) because, under state law, the filing of a notice of dispute allows suspension of benefits regardless of its contents and even if the notice is filed in bad faith. Therefore, any fraud in the notices of dispute (and respondents maintain that there was none) could not have been the proximate cause of the suspension of benefits; rather, it was the filing of the notices of dispute, regardless of any alleged fraud contained therein, that was the proximate cause. In addition, petitioners settled their worker's compensation claims without any decision by the state agency on the merits so that there could be no fraudulent causation at that juncture either. As in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), because petitioners have not satisfied the proximate cause requirement in civil RICO mail fraud cases, there is no occasion for the Court to address in this case any arguments regarding the reliance requirement. Moreover, whether there is a disagreement in the circuits regarding the issue of reliance under Section 1964(c) following the *Anza* decision would be better determined in a case where the court below was afforded an opportunity to reconsider its circuit precedent in light of that ruling by this Court. Indeed, in the instant case, petitioners failed to petition for *en banc* consideration even though the panel explicitly notified them of the court of appeals' inability to reconsider its own precedent absent such review.

STATEMENT

1. Statutory Framework

a. The Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, was enacted in 1970 to combat the influence of organized crime over the national economy. Under RICO, it is unlawful for a person to criminally influence or corrupt an organization. 18 U.S.C. § 1962(c). Specifically, Section 1962(c) makes it unlawful for a person employed or associated with an enterprise to conduct or participate in the conduct of the enterprise's affairs through a pattern of "racketeering activity." Racketeering activity is defined by RICO to include acts that can be charged under the federal mail fraud statute. *See* 18 U.S.C. § 1961(1)(B).

In addition to criminal penalties, 18 U.S.C. § 1963, RICO also allows civil remedies in certain circumstances, 18 U.S.C. § 1964. A person may bring a civil action for treble damages, costs, and attorneys' fees if the person was "injured in his business or property *by reason of* a violation of section 1962." 18 U.S.C. § 1964(c) (emphasis added).

Congress did not, however, intend that everyday fraud cases always morph into civil RICO actions. RICO does *not* "allow all actually injured plaintiffs to recover," as this Court recognized when it held that Section 1964's "by reason of" language requires that a civil RICO plaintiff prove not only "but for" causation, but also proximate cause. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-268 (1992).

b. The Michigan Worker's Disability Compensation Act, like typical worker's compensation statutes in other States, provides a remedy against an employer for an employee who is injured or disabled on the job. Mich. Comp. Laws § 418.131(1) (1969). The system provides substantial advantages to employees because Michigan law (first enacted in 1912 and substantially amended in 1969) requires an employer to compensate its employees

for *any* injury suffered in the course of employment, regardless of fault. As such, an employee is relieved of the burden of proving that the employer acted negligently. The law also requires exceptionally prompt payment to the injured employee. And it eliminates certain common law defenses that would otherwise be available to the employer, such as contributory or third-party negligence and assumption of risk. Michigan law also ensures that an employer demonstrate its capacity to pay the appropriate remuneration to its injured employees and requires an employer to purchase sufficient insurance from a commercial insurance carrier or to obtain self-insurance status, which requires approval from the Bureau of Workers' Disability Compensation. Mich. Comp. Laws §§ 418.601-418.657 (1969). At the same time, the worker's compensation system provides an advantage to employers because an employee's recovery is limited to lost wages, medical treatment, and rehabilitation services.

Once an employee establishes an injury compensable under Michigan's worker's compensation scheme, an employer is obligated to pay worker's compensation benefits within two weeks of notice and on a weekly basis thereafter. Mich. Comp. Laws § 418.801(1) (1969). But if, over time, the employee recovers from his work-related injury, the employer is no longer required to pay worker's compensation benefits. As such, an employer and its insurance carrier are entitled to an independent medical evaluation regarding the ongoing nature of the injury, in order to help determine whether the employee has a continued entitlement to worker's compensation benefits. Mich. Comp. Laws § 418.385 (1969) ("After the employee has given notice of injury and from time to time thereafter during the continuance of his or her disability, if so requested by the employer or the carrier, he or she shall submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, furnished and paid for by the employer or the carrier.").

The employer always possesses a statutory right to dispute the continued payment of benefits by filing a notice of dispute with the bureau of worker's compensation. Mich. Comp. Laws §§ 418.841(1), 418.847(1) (1969). The filing of a "notice of dispute" (a standardized form, *see* Pet. App. 52) relieves an employer or its insurance carrier from having to pay weekly worker's compensation benefits unless the dispute is resolved favorably to the employee. Mich. Comp. Laws § 418.801(2) (1969).

The filing of a notice of dispute is merely the initiation of a formal adjudication. It is not a determination as to the merits of an employee's entitlement to benefits. Under the statute, "[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under th[e] act shall be determined by the bureau or a worker's compensation magistrate, as applicable." Mich. Comp. Laws § 418.841(1) (1969). Accordingly, Michigan law dictates that no statutory penalty can be assessed for the filing of a notice of dispute, even if the worker's compensation bureau subsequently determines "that [the employer] had disputed [the employee's] claim in bad faith, with no viable defense." *Couture v. Gen. Motors Corp.*, 335 N.W.2d 668, 670 (Mich. Ct. App. 1983); *see also Warner v. Collavino Bros.*, 347 N.W.2d 787, 789-790 (Mich. Ct. App. 1984) (rejecting any requirement that the filing of a dispute must be in "good faith" and holding "that an employer [who] disputed a claim in bad faith will not justify the assessing of a penalty against the employer").

Once a notice of dispute has been filed by an employer, the employee has an absolute right to a hearing before a magistrate. Mich. Comp. Laws § 418.222 (1969); *see also id.* §§ 418.841(1), 418.847(1) (1969). The employee also has a right to hire an attorney to represent him in the proceeding and to issue subpoenas. *See generally* Mich. Comp. Laws § 418.853; Mich. Admin. Code. r. 418.51 *et seq.*

(2007). The decision by the worker's compensation magistrate following the hearing is subject to appellate review by the appellate commission, and, thereafter, either aggrieved party can apply for review by the Michigan appellate courts. *See* Mich. Comp. Laws § 418.861 (1969).

2. Factual Background

a. Petitioners are former employees of respondent UPS who were awarded worker's compensation benefits based on their claims that they were injured during the course of their employment. Petitioner Yax received worker's compensation benefits based on her claim of a pre-existing back injury beginning in October 2001. Petitioner Traynor received worker's compensation benefits starting on August 20, 2002 based on a claim for a disabling back injury. Petitioner Dzagulones received worker's compensation benefits starting in November 1999 for nerve damage he claims he sustained when lifting boxes as a UPS driver. Pet. App. 11-12.

After an independent medical evaluation of each petitioner demonstrated that the condition of his or her injury no longer required payment of worker's compensation benefits, respondent Liberty Mutual Insurance Company (Liberty Mutual), the worker's compensation insurer for respondent UPS, initiated the administrative process to determine that continued benefits were not due. In each case, respondent Liberty Mutual filed a notice of dispute with the worker's compensation bureau and mailed copies of those notices to each of the petitioners respectively on September 17, 2002, Pet. App. 37 (petitioner Yax), March 13, 2003, Pet. App. 38 (petitioner Traynor), and April 22, 2003, Pet. App. 40 (petitioner Dzagulones). According to petitioners, these notices of dispute "misled the Agency as to the basis for defendants' cut-off of benefits." Pet. 22. The notices of dispute form the predicate for petitioners' civil RICO action because petitioners contend that the statement "No medical evidence for continued disability"

in each notice "was fraudulent." Pet. App. 37 (petitioner Yax); *see also* Pet. App. 38 (alleging that the notice of dispute with respect to petitioner Traynor was not true); 2d Am. Compl. ¶ 29 (alleging that notice of dispute with respect to petitioner Dzagulones was not true); Pet. App. 18 ("Plaintiffs in fact claim Defendants provided false and [mis]leading information to the Worker's Compensation board.").

b. Petitioners then filed the instant civil RICO action against respondents on May 29, 2003 in the United States District Court for the Eastern District of Michigan. Petitioners asserted that respondents' exercise of their state law right to an adjudication of the challenge to petitioners' claim for continued worker's compensation benefits constituted a "pattern of racketeering activity" in violation of 18 U.S.C. § 1962(c). Pet. 7. Petitioners asserted that they were injured by respondents' alleged fraud "because it deprived [them] of workers compensation benefits and because it caused [them] the expense of paying attorney fees and [their] own mileage to and from medical care." 2d Am. Compl. ¶¶ 12 (petitioner Yax), 22 (petitioner Traynor), 30 (petitioner Dzagulones). They sought "damages measured by the amount of benefits improperly withheld" "plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law." *Id.* ¶¶ 18, 27, 36.

Respondents moved to dismiss petitioners' complaint on two grounds relevant here. Respondents asserted that petitioners' RICO claims were barred by the primary jurisdiction doctrine which requires that the matter be determined by the Michigan Worker's Compensation Bureau. Respondents also argued that petitioners failed to plead proximate causation as required under 18 U.S.C. § 1964(c) to demonstrate that any alleged civil RICO mail fraud injury was "by reason of" the alleged fraud.

The district court agreed that the question whether the employees' physical injuries "arose out of and in the course of [their] employment 'is a question to be resolved

in the first instance exclusively by the Bureau.'" Dist. Ct. Order at 7 (Mar. 31, 2004) (quoting *Sewell v. Bathey Mfg. Co.*, 303 N.W.2d 876 (Mich. 1981)). The court explained "that the Worker's Compensation Bureau is most qualified to determine whether [respondents] acted properly when they terminated [petitioner's] workers' compensation benefits" and the case "should be stayed" pending a resolution of those proceedings. *Ibid.*

But the district court also found "that it would be futile to stay this case if dismissal [was] proper for other reasons." *Id.* at 8. The court concluded that dismissal was proper for the other reason that petitioners' allegations failed to state a cause of action because civil RICO requires a plaintiff to plead that the alleged fraud was relied upon to meet the requirement of Section 1964(c) that a plaintiff be injured "by reason of" the alleged racketeering conduct. *Id.* at 17-19. Accordingly, the court dismissed petitioners' complaint but granted them limited leave to amend their civil RICO cause of action. *Id.* at 25.[1]

Petitioners amended their complaint on April 23, 2004, Pet. App. 42-51, and respondents moved, on May 4, 2004, to dismiss petitioners' amended civil RICO cause of action, again, for among other issues, the failure to plead the requisite causation. In the alternative, respondents asked the court to stay the case pending resolution of petitioners' worker's compensations claims before the state worker's compensation bureau.

While respondents' motion to dismiss was pending against them, petitioners each entered into a settlement agreement with respondents for their worker's compensation claims on May 28, 2004 (petitioner Traynor), August 5, 2004 (petitioner Dzagulones), and March 5, 2005 (petitioner Yax). The settlements compensated petitioners

[1] Petitioners erroneously filed a notice of appeal from the non-final order granting them leave to amend their complaint. The Sixth Circuit required them to dismiss their appeal on May 14, 2004.

for alleged lost worker's compensation benefits (also alleged as civil RICO mail fraud injuries in their lawsuit) and, as part of the settlement, petitioners accepted and approved the various relevant medical reports, including reports they previously indicated were fraudulent. But petitioners did not release any rights to proceed under RICO.[2]

The district court ultimately dismissed petitioners' second amended complaint with prejudice on May 27, 2005. Pet. App. 9-19. The court ruled that the filing of a notice of dispute regarding petitioners' claims under the Michigan worker's compensation system could not amount to a civil RICO mail fraud violation because none of the alleged fraud "was intended to mislead Plaintiffs," Pet. App. 16, and petitioners could not demonstrate that they "relied on those misrepresentations or omissions to their detriment," *id.* at 14. The court also explained that petitioners could "show no alleged false statements." Pet. App. 15. The court noted that the notice of dispute was not false because respondents had terminated the benefits "and claimed it was based on no medical evidence of continued disability." *Id.* at 16. Moreover, the district court explained that the reason that independent medical evaluations "are taken and reports sent to the Worker's Compensation Board is to allow the Board to make a decision about disability payments." *Ibid.*

Finally, the district court ruled (for the second time) that petitioners had not satisfied Rule 9(b) of the Federal Rules of Civil Procedure. Pet. App. 17-18, *see also* Pet. App. 26-28 (district court's March 31, 2004 dismissal of first amended complaint). The district court found that petitioners failed to plead in their complaint any particularized fraudulent communications, which was

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[2] Petitioners also attempted to file, without leave of the district court, a Third Amended Complaint (after filing a "Revised" Second Amended Complaint) while respondents' motion to dismiss was pending. The court denied leave to file the Third Amended Complaint.

inexcusable because they had "already gone through the worker's compensation process" in settling their claims. Pet. App. 18.

c. The court of appeals affirmed. Pet. App. 1-8. The court explained that "a plaintiff 'cannot maintain a civil RICO claim . . . absent evidence that the defendants made misrepresentations or omissions of material facts to [the plaintiff] and evidence that [the plaintiff] relied on those misrepresentations or omissions to its detriment." Pet. App. 4 (quoting *Cent. Distribs. of Beer, Inc. v. Conn.*, 5 F.3d 181, 184 (6th Cir. 1993)) (alterations in original). Petitioners' primary argument was that the court of appeals should modify its longstanding precedent on reliance in civil RICO mail fraud actions, established in *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984). Pet. App. 4. The panel made clear, however, that it could not reverse this precedent and that such a modification could occur only if the Sixth Circuit "sitting en banc overrules the prior decision." *Ibid.* (quoting *United States v. Washington*, 127 F.3d 510, 517 (6th Cir. 1997)). With respect to petitioners' claim that their civil RICO cause of action adequately pleaded reliance, the court of appeals explained that the "complaint does not allege what misrepresentation (or omissions) of material fact [UPS] made to the plaintiffs that they reasonably relied upon to their detriment." Pet. App. 5-6 (quoting *Bender*, 749 F.2d at 1216) (alterations in original). The court of appeals held that "[w]hat Plaintiffs characterize as reliance upon the statements contained in the notices [*i.e.*,] payments of various expenses and deprivation of benefits are, in reality, nothing more than consequences flowing from Defendants' decision to contest Plaintiffs workers' compensation benefits in each case." *Id.* at 6 (alterations omitted).

Notwithstanding the court's express admonition to petitioners that only the *en banc* court could provide them with the relief they sought, petitioners did not seek rehearing *en banc*.

REASONS THE PETITION SHOULD BE DENIED

The unpublished decision of the Sixth Circuit is correct and is based on longstanding circuit precedent. Petitioners now request review by this Court of a question of reliance in civil RICO mail fraud actions. Petitioners make this request even though they did not ask the Sixth Circuit *en banc* to reconsider its own precedent or to consider the intervening proximate cause precedent of this Court in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), or even *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), which also post-dates the circuit precedent on which the Sixth Circuit relied, *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984).

Review by this Court is not warranted here because petitioners cannot, as a matter of law, establish the proximate cause necessary to support a civil RICO mail fraud cause of action under 18 U.S.C. § 1964(c). *See Anza*, 126 S. Ct. at 1998 (the absence of proximate cause gives this Court "no occasion" to address the issue of reliance). Any purported fraud (and respondents maintain that there was none) in the notices of dispute filed by respondent Liberty Mutual with the state worker's compensation bureau did not lead directly to any injury to petitioners. The filing of a notice of dispute, regardless of any fraud or bad faith, is grounds for suspension of benefit payments as a matter of state law until any determination by the state agency that continued benefits are due the employee. State law provides a full and fair hearing before a magistrate that can award an aggrieved employee back benefits with interest. *See* pages 2-5 *supra*. And state law provides the actual victim of any such fraudulently filed notice of dispute – *i.e.*, the state worker's compensation bureau – with adequate means to vindicate its rights. Here, as in *Anza*, there is too tenuous a relation between the suspension of benefits asserted as petitioners' civil RICO mail fraud injury and the purportedly fraudulent conduct, for the case to merit this Court's consideration. *Anza*, 126 S. Ct. at 1999. Moreover, petitioners settled

their worker's compensation claims and the state agency never made a decision on the merits that could possibly have been influenced by any fraudulent statements, thus making this case an especially inappropriate vehicle to address reliance.

Petitioners' arguments regarding the views of the various courts of appeals on the issue of reliance in RICO cases are inapposite and do not demonstrate that this case would have yielded a different result in another circuit. The petition also fails to address adequately the pertinent appellate decisions and their relevance to the instant dispute, and is rife with basic misreadings of circuit court precedent.

The court of appeals correctly held that petitioners' civil RICO mail fraud cause of action must fail because petitioners do not plead, and cannot establish, that they relied on any purported fraud to their detriment. As the courts below correctly recognized, allowing petitioners' civil RICO action to proceed would create a circumstance where filing a notice of dispute with a *state* worker's compensation bureau would transform any ordinary state worker's compensation dispute into a *federal* civil RICO mail fraud suit. Every employee whose right to worker's compensation benefits is challenged by an employer would have an incentive to threaten a civil RICO mail fraud suit whenever an employer or its insurer uses the mails. Not only would this cause an unprecedented expansion of civil RICO, it would significantly undermine state worker's compensation systems across the nation, a result that was not intended by Congress when it enacted RICO. The ruling below should not be disturbed through exercise of this Court's discretionary review.

I. PETITIONERS' CASE IS A POOR VEHICLE IN WHICH TO ADDRESS THE ISSUE OF CIVIL RICO RELIANCE BECAUSE THERE IS NO PROXIMATE CAUSATION AND NO DIFFERENT RESULT WOULD HAVE BEEN REACHED IN ANY OTHER CIRCUIT

Petitioners' vague petition obscures the true nature of their civil RICO mail fraud action. Petitioners assert that the initiation of state agency proceedings by the filing of a notice of dispute somehow constitutes racketeering and caused them RICO injury. The unpublished opinions of the court of appeals and the district court correctly recognize, however, that respondent Liberty Mutual did no more than file notices of dispute to seek, as provided for by state law, full and fair state law adjudication of petitioners' worker's compensation claims. Pet. App. 6; 15-16. No court has ever sustained such a novel expansion of civil RICO, and prior attempts to create such a cottage industry of civil RICO mail fraud suits out of the mere invocation of state law adjudicative procedures have been unequivocally rebuffed. *See, e.g.*, *Moon v. Harrison Piping Supply*, 465 F.3d 719 (6th Cir. 2006) (rejecting civil RICO mail fraud claim based upon near-identical complaint against different employer), *cert. denied*, __ S. Ct. __ (2007). This Court's sanction of such a complaint would open the floodgates to concurrent and collateral federal litigation over the accuracy of state administrative and judicial filings and proceedings.

The unique and unprecedented expansion of civil RICO that petitioners seek makes this case a singularly poor vehicle to address whether reliance is necessary in a civil RICO suit alleging federal mail fraud. First, the issue of proximate cause in this case – an issue intertwined with reliance – is eclipsed by state law that allows for suspension of worker's compensation benefit payments regardless of whether a fraudulent notice of dispute is filed. Second, petitioners are wrong that their complaint would survive a Rule 12 motion to dismiss in other circuits. Petitioners misread the cases they cite and, in

any event, there would be no different outcome under any other reliance test on the facts of this case. The absence of any determination of the merits of petitioners' worker's compensation claims by the state worker's compensation bureau means that the bureau could not have possibly relied on any purportedly fraudulent submission by respondents.

A. There Is No Proximate Cause To Support The Civil RICO Claim In This Case

Proximate cause is a required element in a civil RICO action. A plaintiff must show that a defendant's violation "not only was a 'but for' cause of his injury, but was the proximate cause as well." *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1996 (2006) (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992)). To satisfy this requirement, there must be "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268.

As in *Anza*, the clear absence of proximate cause in this case makes it a poor vehicle to allow consideration of the scope of reliance that is required generally in a civil RICO case alleging mail fraud. 126 S. Ct. at 1998. In the context of fraud, reliance is best understood as a necessary, but not always sufficient, means to demonstrate causation. *See Restatement (Second) of Torts* § 546 (1977). Thus, it would be anomalous to address reliance in a case where proximate cause is clearly lacking because, as the courts of appeals have overwhelmingly recognized, reliance is a well-accepted aspect of proximate cause in a civil RICO suit. *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360-1361 (11th Cir. 2002); *Summit Props. Inc. v. Hoeschst Celanese Corp.*, 214 F.3d 556, 560-562 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001); *VanDenBroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994).

Petitioners' complaint is fundamentally defective in this regard. As this Court has made clear, "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza*, 126 S. Ct. at 1998. In the instant case, the alleged violation is respondent Liberty Mutual's inclusion of purportedly fraudulent statements in the notices of dispute that were filed to seek adjudication by the state agency of whether petitioners suffered a continuing disability that entitled them to worker's compensation benefits. Pet. App. 37 (alleging that statement in the notice of dispute with respect to petitioner Yax "was fraudulent"); Pet. App. 38 (alleging that the notice of dispute with respect to petitioner Traynor was not true); 2d Am. Compl. ¶ 29 (alleging that notice of dispute with respect to petitioner Dzagulones was not true); Pet. App. 18 ("Plaintiffs in fact claim Defendants provided false and [mis]leading information to the" bureau). Petitioners claim that they suffered RICO injury caused by allegedly fraudulent statements because they stopped receiving worker's compensation benefits upon the filing of the notices of dispute. Pet. App. 2, 6.[3]

But it is clear that, as a matter of state law, the inclusion of any fraudulent statements in the notices could not have "led directly" to the suspension of the worker's compensation benefit payments to petitioners. That is so because, under Michigan law, the filing of *any* notice of dispute allows the suspension of worker's compensation benefit payments, *see* Mich. Comp. Laws § 418.801(2)

[3] Because the district court correctly held that petitioners' complaint also fails to satisfy the requirements of Rule 9(b) to plead fraud with particularity, Pet. App. 17, 26-28 (indeed, the complaint provides virtually no road map as to what purportedly fraudulent statements were made) that provides another basis for affirmance by this Court and would make it difficult for this Court to address issues of proximate cause and reliance in this case.

(1969), and that is true even if the filing of a notice of dispute was in bad faith. *Warner v. Collavino Brothers*, 347 N.W.2d 787, 789-790 (Mich. Ct. App. 1984); *Couture v. Gen. Motors Corp.*, 335 N.W.2d 668, 670 (Mich. Ct. App. 1983). Thus, state law dictates that the outcome would have been the same in this case, regardless of the contents of the notices of dispute.

That is not to say that the issue of reliance could never be addressed in some potentially analogous situations. For example, proximate cause might exist if a state agency *incorrectly* rendered a decision on the merits *based solely upon* fraudulent statements. Under such circumstances (and if those hypothetical plaintiffs had made particular allegations to that effect), the alleged fraud may have "led directly" enough to the alleged injury to allow a court to decide whether reliance was required, *see Anza*, 126 S. Ct. at 1998; *Holmes*, 503 U.S. at 268-269.[4] But such a case would present this Court with a better vehicle to address whether reliance is required in a civil RICO action alleging violations of mail fraud. In such a

[4] In the instant case, petitioners did everything in their power to not allow the state administrative proceedings to run their course to an adjudication so this case does not present such a fact pattern. For example, respondent Liberty Mutual filed a dispute with the state worker's compensation bureau as to petitioner Traynor's worker's compensation benefits on March 13, 2003, but Traynor and the other petitioners filed the complaint in the instant case in federal court on May 29, 2003, providing the worker's compensation bureau no opportunity to adjudicate the claim. The district court recognized this attempt to subvert state law procedures and dismissed and stayed the civil RICO action on March 31, 2004. *See* Dist. Ct. Order (Mar. 31, 2004). In response, petitioners filed an amended complaint on April 24, 2003 and, a few months later, settled their worker's compensation cases and "accepted and approved" the medical reports, but left their civil RICO action for treble damages to be adjudicated. Of course, as discussed in note 5 *infra*, even if petitioners had pled such a scenario, their complaint would still be defective as a matter of law on other grounds.

case, however, other significant defenses may exist.[5] The absence of such circumstances in the instant case should preclude this Court's review.

B. Plaintiffs Misread The Court Of Appeals Cases They Cite, And They Would Not Benefit From A Different Reliance Requirement

Even if this Court were to overlook the absence of proximate cause in this case, petitioners fail to explain how any disagreement amongst the circuits is relevant to their civil RICO mail fraud cause of action. In alleging a broad conflict of authorities in the courts of appeals, petitioners mischaracterize the cases they cite and fail to demonstrate that their complaint would survive under the standards articulated in *any* of the cases upon which they rely. As discussed below, there is no circuit authority that unequivocally eliminates all requirement that a plaintiff plead reliance, and petitioners' inability to do so in the instant case is fatal to their cause of action. As such, even if a split involving the scope of the reliance requirement

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[5] In the context of a state adjudication, numerous hurdles would have to be overcome by a civil RICO plaintiff. Primary jurisdiction and other abstention doctrines would likely prove fatal to such a complaint. Moreover, principles of federalism might be offended if federal courts were to investigate the *reasons* why a state court or its administrative counterpart reached the ruling it did. In this case, for example, the district court correctly held that petitioners' civil RICO cause of action was reverse preempted by the McCarran Ferguson Act, 15 U.S.C. § 1012, *see* Dist. Ct. Order at 8-11 (Mar. 31, 2004), and that the complaint was not pled with particularity as required by Fed. R. Civ. P. 9(b), *see* Pet. App. 17-18, both of which further demonstrate the futility of petitioners' action. The court of appeals found it unnecessary to rely upon these alternative grounds for affirmance, Pet. App. 6, but these alternative grounds supporting the judgment below undermine the value of this case as a means for addressing questions of reliance and would support affirmance by this Court in any event.

would be worthy of this Court's plenary review, it is plainly inapposite to this dispute.

1. Petitioners err in claiming (Pet. 19-20) that the Third, Eighth, and Ninth Circuits do not require a civil RICO plaintiff to plead reliance to support a claim of mail fraud. No court of appeals has adopted such a rule.

The Eighth Circuit, like the Sixth Circuit, requires a civil RICO plaintiff alleging mail fraud to plead reliance as part of proximate cause. That court has expressly held: "In order to establish injury to business or property 'by reason of' a predicate act of mail or wire fraud, a plaintiff must establish detrimental reliance on the alleged fraudulent acts." *Appletree Square I*, 29 F.3d at 1286. As such, the Eighth Circuit is in accord with the ruling below. Petitioner's citation (Pet. 19) to the Eighth Circuit's decision in *Abels v. Farmers Commodities Corp.*, 259 F.3d 910 (8th Cir. 2001), is irrelevant to the issue of reliance, as petitioners' out-of-context and selective quotes of that opinion address only whether the plaintiffs had "adequately pleaded a 'pattern of racketeering activity.'" *Id.* at 918 (quoting 18 U.S.C. § 1962(c)).[6]

Neither the Ninth Circuit nor the Third Circuit have ruled on whether reliance is required. *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.* 806 F.2d 1393 (9th Cir. 1986), does not support petitioners' alleged split. Pet. 19. Even the most cursory review of that decision demonstrates that the Ninth Circuit was describing only the statutory requirements for the predicate acts of mail and wire fraud, *Schreiber Distributing*, 806 F.2d at 1399-1400, without addressing the civil RICO "by reason of" requirement in Section

[6] The quoted statements from *Abels* referred to whether the mailing needed to communicate the fraud or merely "assist[] in carrying out the fraud"; the court did not, and could not, obviate the requirement that there be fraud. *Abels*, 259 F.3d at 918 (quoting *Atlas Pile Driving v. DiCon Fin. Co.*, 886 F.2d 986, 992 (8th Cir. 1989)).

1964(c). Indeed, the question of reliance is *expressly* unresolved in the Ninth Circuit. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666 (9th Cir. 2004) ("Because it is neither necessary nor prudent to reach the issue of whether reliance is the only way plaintiffs can establish causation in a civil RICO claim predicated on mail fraud, we decline to do so.").

Petitioners again miss the mark by relying upon *Tabas v. Tabas*, 47 F.3d 1280 (3d Cir.) (en banc), *cert. denied*, 515 U.S. 1118 (1995). Pet. 19-20. That decision also did not resolve the question of reliance. Rather, *Tabas*, just like petitioners' mistaken citation to the Eighth Circuit's ruling in *Abels*, focused on the question of whether the defendant had engaged in a pattern of racketeering activity. With respect to *that* issue, the Third Circuit explained that "the elements of the federal offense of mail fraud" do not require a showing that "the mailings involved" *themselves* contained misrepresentations or were "relied upon by the victim of the fraud," as opposed to a different aspect of the racketeering scheme. *Tabas*, 47 F.3d at 1294 and n.18. The Third Circuit did not decide, and has not decided, the question presented by petitioners as to whether reliance is an element of proximate cause under Section 1964(c).

In any event, the question whether precedent in the various circuits fails to require reliance in a civil RICO action alleging mail fraud is of diminishing importance after this Court's decision in *Anza*, because any such precedent would plainly have to be reconsidered. If the primary proximate cause consideration is whether a defendant's fraud "led directly" to the plaintiff's injury, there must be some reliance on the fraud for the defendant to be responsible for the harm. *Anza*, 126 S. Ct. at 1998. Indeed, petitioners can identify *no* circumstance under

Anza in which proximate cause could exist in the absence of reliance on the alleged misrepresentation.[7]

2. Having gone 0-3 in their attempt to prove that three circuits do not require reliance, petitioners fare no better in their argument that their case would survive if it were filed in the First, Fourth, or Fifth Circuits. Petitioners correctly concede that those courts of appeals require reliance albeit in different degrees,[8] Pet. 20-24, but then wrongly suggest that their complaint demonstrates that a third party (the worker's compensation bureau) relied upon the purportedly fraudulent notices of dispute to the direct detriment of petitioners, which they contend would satisfy the reliance requirement of those circuits.

First, petitioners' assertion that the statements in the notices of dispute "misled the Agency as to the basis for defendants' cut-off of benefits" is wrong. Pet. 22. In no manner did the worker's compensation bureau "rely" upon allegedly fraudulent statements by respondents to "cut-off" petitioners' benefits. As discussed above, as a matter of Michigan law, the filing of a notice of dispute

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[7] As of April 18, 2007, only four published decisions of the courts of appeals have cited *Anza*, and none have held that reliance is not required in a civil RICO cause of action. *See, e.g.*, *Phoenix Bond & Indem. Co. v. Bridge*, 477 F.3d 928 (7th Cir. 2007), *petition for rehearing pending*; *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 1381 (2007); *James Cape & Sons Co. v. PCC Construction Co.*, 453 F.3d 396 (7th Cir. 2006); *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273 (2d Cir. 2006). This Court would be better served by allowing its decision in *Anza* to percolate in the courts of appeals before addressing an issue so closely related to the Court's decision last Term.

[8] The Ninth Circuit incorrectly asserts that the First Circuit in *Systems Management, Inc. v. Loiselle*, 303 F.3d 100 (1st Cir. 2002), requires no reliance. *Poulos*, 379 F.3d at 666 n.3. *Systems Management* is better read as a third-party reliance decision because it involved a circumstance where the plaintiff did not rely upon the misrepresentation, but a third party plainly did, to the direct detriment of the plaintiff. Indeed, that is how petitioners read the First Circuit ruling. Pet. 21.

allows suspension of benefit payments irrespective of its content or whether it is filed in good or bad faith, *see* Mich. Comp. Laws § 418.801(2) (1969); *Couture*, 335 N.W.2d at 670; *Warner*, 347 N.W.2d at 789-790, until there is a formal adjudication. Thus, it does not matter whether a notice of dispute states "improper reasons for the cut-offs of benefits," Pet. 23, because Michigan law allows suspension of benefits without regard to the contents of the notice of dispute. Indeed, the court of appeals correctly recognized that "[w]hat Plaintiffs characterize as reliance upon statements contained in the notices * * * are, in reality, nothing more than consequence flowing from Defendants' decision to contest Plaintiffs' workers' compensation benefits in each case." Pet. App. 6. Similarly, any alleged fraud in medical reports, Pet. App. 39-41, could not have been relied upon by a worker's compensation magistrate or bureau because *neither made a decision* about the merits of the challenge to the worker's compensation payments to petitioners. Moreover, any argument that an alleged RICO injury could be premised on any such medical reports would be even more tangential and lack proximate cause. The district court correctly recognized that "the *only* reason [independent medical evaluations] are taken and reports sent to the Worker's Compensation Board is to allow the Board *to make a decision* about disability payments." Pet. App. 16 (emphasis added).

Second, the nature of the worker's compensation proceeding, and the absence of any adjudication, makes the issue of reliance (particularly as an aspect of proximate cause) difficult to discern. As in *Anza*, the "attenuated connection" between the alleged injury in this case and the conduct alleged can be demonstrated by "the speculative nature of the proceedings that would follow if [petitioners] were permitted to maintain [their] claim[s]." *Anza*, 126 S. Ct. at 1997-1998. Were a case such as this to proceed to trial, a court would need to determine whether the statements in the notices of dispute were false, whether the worker's compensation bureau relied upon those statements, and whether petitioners would have

received their benefits absent such reliance. This type of speculation has no place in civil RICO actions, and this Court's precedents recognize that "these types of intricate, uncertain inquiries" must be prevented "from overrunning RICO litigation." *Id.* at 1998.

Third, if a disagreement among the circuits develops post-*Anza*, this Court will have better opportunities to address the degree of reliance required in civil RICO mail fraud cases. For example, following *Anza*, the Seventh Circuit in *Phoenix Bond & Indemnity Co. v. Bridge*, 477 F.3d 928 (7th Cir. 2007), *petition for rehearing en banc pending*, recently addressed a fact pattern that seems to present circumstances where third-party reliance might apply. In that case, the alleged fraud occurred when the defendants filed a false or misleading affidavit stating that they had submitted only one bid in a county tax lien auction (an affidavit was required because multiple bids disqualified a bidder). Allegedly, the county relied upon the false affidavit and was defrauded into permitting the defendant to participate in the auction, to the detriment of other bidders. Plaintiffs, the competing bidders, alleged that they were injured by this fraud, and brought a civil RICO claim. The Seventh Circuit permitted the action to go forward because the plaintiffs were direct victims of the fraud, even though another party actually received the false statements. *Id.* at 932. *Phoenix Bond & Indemnity Co.* is currently pending on petition for rehearing *en banc* (a step petitioners in the instant case did not take). The parties there are represented by experienced counsel and that case would provide a far better fact pattern for this Court to address the necessity of a reliance requirement.

II. The Sixth Circuit Correctly Required That Petitioners Plead Detrimental Reliance And There Is No Basis To Reverse The Decision Below

Petitioners err in claiming this Court held in *Holmes* that reliance is not required in a civil RICO fraud action.

Pet. 15-18. Indeed, petitioners' argument in this regard further highlights the basic deficiency of their submission and the inappropriateness of review in the instant case.[9] This Court has never held that reliance is not required in a civil RICO suit that alleges violations of federal mail or wire fraud. Rather, this Court's well-established precedent demonstrates that reliance must be a necessary component of proximate cause in a civil RICO cause of action like this one.

The courts of appeals consistently have held that reliance is an aspect of proximate cause. *Sikes*, 281 F.3d at 1360; *Summit Props. Inc.*, 214 F.3d at 560-562; *VanDenBroeck*, 210 F.3d at 701; *Chisolm*, 95 F.3d at 337; *Appletree Square I,* 29 F.3d at 1286. And, as discussed above, proximate cause is required by Section 1964(c)'s "by reason of" provision in civil RICO actions predicated on mail and wire fraud. *Holmes*, 503 U.S. at 278.

Petitioners blithely overlook this Court's explicit command in *Holmes*. Rather, relying on *Neder v. United States*, 527 U.S. 1 (1999), petitioners argue that a *civil*

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[9] Petitioners argue that this Court in *Holmes* cited *Taffet v. The Southern Co.*, 930 F.2d 847 (11th Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992), and *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990), for the proposition that a civil RICO plaintiff who failed to prove common law fraud can nonetheless establish proximate cause. Pet. 18. This Court, at most, indicated only that proximate cause "might" be satisfied in the circumstances of those cases. *Holmes*, 503 U.S. at 274 n.19. Reliance was required and established in both cases. The court of appeals in *Long Island Lighting* held that it was necessary for the plaintiffs to demonstrate that the misrepresentations "were relied upon." *Long Island Lighting*, 907 F.2d at 1311. Reliance was present in *Taffet*, because the alleged wrongdoing in that case was that the defendant utility companies fraudulently submitted false statements to the IRS, which were relied upon by the IRS to reduce or defer the utilities' tax burden. The statements had the collateral effect of injuring plaintiffs by permitting the defendants to charge higher rates. *Taffet*, 930 F.2d at 850. Of course, in *Anza*, this Court held that precise fact pattern to be devoid of proximate cause. *Anza*, 126 S. Ct. at 1994-1995.

RICO action requires only allegations of an "indictable" act under the mail fraud statute, not "reliance" and "damages" which, according to petitioners, "plainly have no place in the federal fraud statutes." Pet. 13 (citing *Neder*, 527 U.S. at 24). Petitioners argue that the decision below conflicts with this Court's precedents requiring only a "'scheme to defraud[]' rather than the completed fraud," *Neder*, 527 U.S. at 25, thus obviating any reliance requirement (as well as any injury in fact). Pet. 14.

Petitioners' argument is fatally flawed because it conflates the standards required in criminal RICO cases with the standards required in civil RICO cases, and would lead to nonsensical results. The government, in a *criminal* prosecution for mail and wire fraud, is relieved of such proof because it does not need to satisfy the *civil* standard of Section 1964(c). *Cf. United States v. Rowe*, 56 F.2d 747, 749 (2d Cir.) (L. Hand, J.) ("Civilly of course the action would fail without proof of damage, but that has no application to criminal liability."), *cert. denied*, 286 U.S. 554 (1932). Section 1964(c) plainly requires more in civil actions for treble damages, *viz.*, an injury "by reason of" the enterprise's racketeering activity. *Anza*, 126 S. Ct. at 1995-1998; *Holmes*, 503 U.S. at 266-268.

This Court has held that the elements of federal mail and wire fraud are derived from common law. *Holmes*, 503 U.S. at 267-268. Under the common law, civil fraud requires that a plaintiff "must have been misled to his prejudice or injury." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 203, at 227 (13th ed. 1886). The unpublished decision below is consistent with that requirement because the court of appeals held that a civil RICO plaintiff alleging violations of mail fraud "cannot maintain a civil RICO claim absent evidence that the defendants made misrepresentations or omissions of material facts to the plaintiff and evidence that the